



DEPARTMENT OF JUSTICE

Antitrust Division

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Patrick R. Gordon, Esquire
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4695 North Mesa
El Paso, Texas 79947-1322

Dear Mr. Gordon:

This letter responds to your request on behalf of Rio Grande Eye Associates, P.A. ("RGEA"), as contained in various submissions dated between March 7, 1997, and April 30, 2001, for the issuance of a business review letter pursuant to the Department of Justice's Business Review Procedure, 28 C.F.R. §50.6.¹ For the reasons set forth below, the Department has no present intention of challenging the proposed operations of RGEA. Our understanding of the facts is based on the representations made in your request, the information you submitted in support of it, and some additional information obtained during our independent investigation.

Based on information provided, we understand RGEA is an Independent Practice Association established as a professional association under Texas law. RGEA's network of eight ophthalmologists will provide ophthalmologic services at reduced prices to managed care plans and other third-party purchasers of ophthalmologic services in the El Paso, Texas area. RGEA will also provide utilization review and quality assurance services.

You have stated that RGEA will be a non-exclusive physician network and that its member ophthalmologists will be free to compete with RGEA, both individually and through other provider networks. Our investigation disclosed that all eight of RGEA's proposed network members are currently participating providers on other physician panels in the El Paso area.

RGEA will negotiate risk contracts with third-party payers. You have stated that RGEA

¹ The original application was made on behalf of Southwest Eye Associates, L.L.C. ("SEA"). When it was subsequently determined that the name SEA was already being used in Texas, the application was refiled on behalf of RGEA, on June 12, 1997.

will implement a 20% fee withholding arrangement whereby RGEA's providers will recoup some or all of the fees withheld only if the members of RGEA, as a group, meet pre-established cost containment and quality utilization goals. Based on this description, it appears and we assume for purposes of this business review that in all RGEA's contracts with payers, RGEA's participating providers will share "substantial financial risk" as that term is described in the *Statements of Antitrust Enforcement Policy in Health Care*, issued jointly by the Department and the Federal Trade Commission in August 1996 [hereinafter *Statements*].

Based on your submission and information from our independent investigation, we have concluded that the product market at issue here is ophthalmologic services. Although other eye care providers, such as optometrists, may provide some of the same services as ophthalmologists, third-party payers whom we interviewed all agreed that there were no adequate substitutes for ophthalmologists who are physicians and provide medical eye care services that others cannot provide.

We have also concluded that the geographic market at issue here is the immediate El Paso, Texas area and does not extend into either New Mexico or Mexico. Although there are other eye care providers 30 miles away in Las Cruces, New Mexico, and just over the border in Juarez, Mexico, third-party payers uniformly viewed Las Cruces as too far for their subscribers to travel for eye care and believed that few enrollees would be willing to travel to Mexico for eye care.

On the basis of the information before us, it appears that RGEA's proposed operations will fall within the Antitrust Safety Zone for non-exclusive physician joint ventures. The requirements for that Safety Zone are as follows: 1) the network must be non-exclusive; 2) the network physicians must share substantial financial risk; and 3) the network must constitute 30% or less of the specialty physicians in the relevant geographic market. *Statements* at 65. We have already explained that RGEA satisfies the first two requirements. Regarding the third requirement, we understand that there are currently 29 practicing ophthalmologists in the El Paso area. Thus, at formation, RGEA will also satisfy the third requirement of this Antitrust Safety Zone since its eight proposed members will comprise only 28% of the ophthalmologists in the relevant market.²

We interviewed various third-party payers in El Paso concerning RGEA's proposed operations. The unanimous opinion expressed by those payers was that it appears unlikely that RGEA's operations, as proposed, will produce any substantial anticompetitive effects; however, the payers would be concerned if RGEA were to become a *de facto* exclusive network. You have

² You have also indicated that you may decide to add one additional provider to RGEA in the future, in order to include a retinal surgeon. In that case, assuming that the surgeon provides other ophthalmology services in addition to retinal surgery, the size would increase to 31%, which is not substantially over 30%. This was not a concern to those we interviewed in El Paso. In any case, nine will remain the maximum size of the network, and new member providers will join RGEA only to replace departing member providers.

stated, however, that RGEA's member providers have no current intention of doing this. Given these considerations, and based on the other information presently available to us, it does not appear that the operations of RGEA, as proposed, would likely lessen competition substantially in ophthalmological services in the El Paso area.

The Department therefore has no present intention to challenge the proposed operations of RGEA. In accordance with our normal practice, however, we remain free to bring whatever action or proceeding we subsequently come to believe is required by the public interest, if the joint venture proves to be anticompetitive in purpose or effect.

This statement is made in accordance with the Department's Business Review Procedure, 28 C.F.R. §50.6. Pursuant to its terms, your business review request and this letter will be made publicly available immediately. In addition, any supporting data that you do not timely identify to be confidential business information under Paragraph 10(c) of the Business Review Procedure will also be made publicly available 30 days from the date of this letter.

Sincerely,

Charles A. James
Assistant Attorney General